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NO. _____

IN THE
SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1988

OLGA
SAFRANEK.....*Petitioner*

vs.

TOWN OF LIMON, DENNIS E. COONTS, DONALD G. BURGESS, FRED PATTERSON, DELMAR L. BEATTIE, DAVID E. SCHROEDER, HOWARD STONE and NORMAN SUNDERLAND.....*Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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(UPON ADMISSION)

Counsel for Petitioner

QUESTIONS PRESENTED

WHETHER THE HOLDINGS OF PARRATT V. TAYLOR, 451 U.S. 527 (1981) AND HUDSON V. PALMER, 468 U.S. 517 (1984) AND THEIR PROGENY APPLY TO A CLAIM ASSERTING A VIOLATION OF A RIGHT PROTECTED BY THE BILL OF RIGHTS UNDER THE UNITED STATES CONSTITUTION SO AS TO PRECLUDE A PLAINTIFF FROM PROCEEDING WITH A 42 U.S.C. §1983 ACTION.

WHETHER THE HOLDINGS OF PARRATT V. TAYLOR, 451 U.S. 527 (1981) AND HUDSON V. PALMER, 468 U.S. 517 (1984) AND THEIR PROGENY APPLY TO A CLAIM ASSERTING A VIOLATION OF THE SUBSTANTIVE COMPONENT OF THE DUE PROCESS CLAUSE UNDER THE UNITED STATES CONSTITUTION SO AS TO PRECLUDE A PLAINTIFF FROM PROCEEDING WITH A 42 U.S.C. §1983 ACTION.

WHETHER THE HOLDINGS OF PARRATT V. TAYLOR, 451 U.S. 527 (1981) AND HUDSON V. PALMER, 468 U.S. 517 (1984) AND THEIR PROGENY APPLY TO A CLAIM ASSERTING A PROPERTY DEPRIVATION RESULTING FROM AN ESTABLISHED STATE AND/OR MUNICIPAL PROCEDURE, CUSTOM, POLICY AND PRACTICE SO AS TO PRECLUDE A PLAINTIFF FROM PROCEEDING WITH A 42 U.S.C. §1983 ACTION.

WHETHER THE ADEQUACY OF A STATE'S POST-DEPRIVATION REMEDIES ARE EVEN RELEVANT WITH REGARD TO CLAIMS ASSERTING A VIOLATION OF A RIGHT PROTECTED BY THE BILL OF RIGHTS, A VIOLATION OF SUBSTANTIVE DUE PROCESS OR A PROPERTY DEPRIVATION RESULTING FROM AN ESTABLISHED STATE AND/OR MUNICIPAL PROCEDURE, CUSTOM, POLICY AND PRACTICE, AND IF SO, WHETHER THE STATE OF COLORADO'S POSTDEPRIVATION REMEDIES ARE ADEQUATE.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINION BELOW 1

JURISDICTION 3

CONSTITUTIONAL PROVISIONS INVOLVED . 3

STATEMENT OF THE CASE 5

REASON FOR GRANTING THE WRIT 11

This Court should grant certiorari and reverse the Tenth Circuit Court of Appeals and remand to the United States District Court for the District of Colorado because its interpretation of Parratt v. Taylor, 451 U.S. 527 (1981) and Hudson v. Palmer, 468 U.S. 517 (1984) is in conflict with those reached by a number of other Federal Circuit Courts of Appeals and Federal District Courts in cases presenting the same issues.

CONCLUSION 18

APPENDIX:

A. Order and Judgment of United States Court of Appeals, Tenth Circuit, dated December 7, 1988 . . . . . A-1

B. Minute Order of United States District Court for the District of Colorado, dated August 29,1986 . . . . A-6

C. Summary Judgment and Order of the United States District Court for the District of Colorado, dated August 18, 1986 . . . A-7

TABLE OF AUTHORITIES

CASES:

Akbarr-El v. Shelley, 631 F. Supp. 1235 (N.D. Ill. 1986) 15

Augustine v. Doe, 740 F. 2d 322 (5th Cir. 1984) 15

Berlanti v. Bodman, 780 F. 2d 296 (3rd Cir. 1985) 20

Burtnieks v. City of New York, 716 F. 2d 982 (2nd Cir. 1983) 21

Daniels v. Williams, 106 S.Ct. 662 (1986) 12, 16-18

Davidson v. Cannon, 106 S.Ct. 668 (1986) 12

Duncan v. Poythress, 657 F. 2d 691 (5th Cir., Unit B 1981) 15

Gilmere v. City of Atlanta, 774 F. 2d 1495 (11th Cir. 1985) (en banc) *cert. denied* 106 S.Ct. 1970 (1986) 14

Gregory v. Town of Pittsfield, 105 S.Ct. 1380 (1985) 21

Hall v. Setton, 755 F. 2d 786 (11th Cir. 1985) 15

Hicks v. Feeney, 770 F. 2d 375 (3rd Cir. 1985) 20

Holland v. Breen, 623 F. Supp. 284 (D. Mass. 1985) 15, 16

Hudson v. Palmer, 468
U.S. 517 (1984) . 9, 11, 12, 14, 16, 17,
19, 20, 24, 28

LaSalle National Bank v. County
of Lake, 579 F. Supp. 8, 10-11
(N.D. Ill. 1984) 21, 24

Lavicky v. Burnett, 758 F. 2d
468 (10th Cir. 1985) 21

Littlefield v. City of Afton, 785 F.
2d 596 (8th Cir. 1986) 15

Logan v. Zimmerman Brush Company,
455 U.S. 422 (1982) 12, 18, 19

Mann v. City of Tucson, 782 F. 2d
790 (9th Cir. 1986) 15

McCrae v. Hankins, 720 F.
2d 863 (5th Cir. 1983) 21

Monroe v. Pape, 365 U.S.
167 (1961) 17, 22, 23

Morello v. James, 810 F. 2d 344
(2nd Cir. 1987) 15

Parratt v. Taylor, 451
U.S. 527 (1981) . 9, 11, 12, 14, 16-21,
24, 25, 28

Patsy v. Board of Regents,
457 U.S. 496 (1982) 24

Patterson v. Coughlin, 761 F. 2d
886 (2nd Cir. 1985), *cert. denied*,
106 S.Ct. 879 (1986) 20, 24

Piatt v. MacDougall, 773 F. 2d 1032 (9th Cir. 1985) (en banc) . . . 20

Ramos v. Gallo, 596 F. Supp. 833 (D. Mass. 1984) 15

Richards v. Meanuel County Hospital Authority, 603 F. Supp. 81 (D.C. Ga. 1984) 24

Robins v. Harum, 773 F. 2d 1004 (9th Cir. 1985) 14

Sager v. City of Woodland Park, 543 F. Supp. 282 (D.C. Colo. 1982) 24

Schiller v. Strangis, 540 F. Supp. 605 (D. Mass. 1982) 15

Shelton v. City of College Station, 754 F. 2d 1251 (C.A. Tex. 1985) . . . 24

State Bank of St. Charles v. Camic, 712 F. 2d 1140 (7th Cir. 1983) . . . 15

Thibodeaux v. Bordelon, 740 F. 2d 329 (5th Cir. 1984) 15

Wells Fargo Armored Service Corporation v. Georgia Public Service Commission, 547 F. 2d 938 (C.A. Ga. 1977) 24

Wolfenbarger v. Williams, 774 F. 2d 358 (10th Cir. 1985) 21

Wolf-Lillie v. Sonquist, 699 F. 2d 864 (7th Cir. 1983) 15

CONSTITUTIONAL PROVISIONS:

United States Constitution,
Amendment V 3, 7, 8

United States Constitution,
Amendment XIV 4, 7, 8, 16

STATUTES:

28 U.S.C. §1254(i) 3

42 U.S.C. §1983 . 7, 10, 11, 13, 14, 17, 18, 20, 22, 23, 29

Colorado Revised Statute
§13-80-102 27

Colorado Revised Statute
§24-10-103(2) 26

Colorado Revised Statute
§24-10-109(1) 26

LAW REVIEWS:

The Supreme Court, 1981 Term,
96 Harvard Law Review 62 (1984) . . . 16

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vs.

TOWN OF LIMON, DENNIS E. COONTS, DONALD G. BURGESS, FRED PATTERSON, DELMAR L. BEATTIE, DAVID E. SCHROEDER, HOWARD STONE and NORMAN SUNDERLAND.....*Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OLGA SAFRANEK, the petitioner, petitions for a Writ of Certiorari to review the Order and Judgment of the United States Court of Appeals for the Tenth Circuit.

OPINION BELOW

On August 18, 1986, the United States District Court for the District of Colorado entered an Order granting Defendant-Respondents' Motion For Summary

Judgment and dismissing Plaintiff-Petitioner's Complaint and cause of action. A copy of the United States District Court's Summary Judgment Order is reprinted in the Appendix to this Petition.

On August 28, 1986, the Plaintiff-Petitioner filed a Motion To Reconsider, Alter, Or Amend Judgment. On August 29, 1986, the United States District Court for the District of Colorado entered a Minute Order denying Plaintiff-Petitioner's Motion To Reconsider, Alter, Or Amend Judgment. A copy of the United States District Court's Minute Order is reprinted in the Appendix to this Petition.

On December 7, 1988, the United States Tenth Circuit Court of Appeals entered its Order and Judgment affirming the Summary Judgment Order of the United States

District Court for the District of Colorado. A copy of the Tenth Circuit's Order and Judgment is reprinted in the Appendix to this Petition.

JURISDICTION

The United States Tenth Circuit Court of Appeals issued its Order and Judgment on December 7, 1988. This Court has discretionary jurisdiction to review this case pursuant to 28 U.S.C. §1254(i).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall...be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "...no state shall make or enforce any law which shall...deprive any person of life, liberty or property, without due process of law..."

STATEMENT OF THE CASE

Petitioner owns certain water wells in Lincoln County, State of Colorado. Petitioner owned the water wells pursuant to prior court adjudications under the laws of the State of Colorado. Petitioner had the right to use any available water on a first, superior and priority basis pursuant to prior court adjudications under the laws of the State of Colorado.

Respondents are the Town of Limon ("Limon"), its Mayor, and its Board of Trustees, all joined in their official capacities.

Petitioner's water wells were and are in close proximity to certain illegal water wells operated by Limon. All of these water wells draw water from the Big Sandy Aquifer. The Big Sandy Aquifer is, in effect, an underground river with

Limon's illegal wells being "upstream" and Petitioner's wells being "downstream". As such, Limon had the physical ability to pump water out of the Big Sandy Aquifer before it reached the Petitioner's wells.

Over the course of time, Limon did in fact engage in numerous acts to appropriate, take, deprive, use and consume water from the Big Sandy Aquifer, which water should have been available to Petitioner for her use in accordance with her vested and adjudicated water rights. The actions of Limon to appropriate, take, deprive, use and consume the water from the Big Sandy Aquifer have been and were being taken pursuant to established state and municipal procedures, ordinances, customs, policies and practices of Limon.

On March 26, 1982, Petitioner filed a Complaint in the United States District

Court for the District of Colorado under 42 U.S.C. §1983 alleging, *inter alia*, that Respondents had deprived Petitioner of her property for public use without just compensation in violation of the Fifth and Fourteenth Amendments of the United States Constitution, that Respondents had deprived Petitioner of her property without substantive due process of law in violation of the Fifth and Fourteenth Amendments of the United States Constitution, and that Respondents had engaged in unlawful and unconstitutional state and municipal procedures, ordinances, customs, policies and practices to deprive Petitioner of her property.

On May 23, 1986, Respondents filed a Motion For Summary Judgment in the United States District Court for the District of

Colorado. On August 18, 1986, the District Court entered an Order granting the Respondents Motion For Summary Judgment. On August 28, 1986, Petitioner filed a Motion To Reconsider, Alter Or Amend Judgment. On August 29, 1986, the District Court entered an Order denying Petitioner's Motion To Reconsider, Alter Or Amend Judgment. On December 7, 1988, the Tenth Circuit Court of Appeals affirmed the District Court's Summary Judgment Order.

For dispositional purposes, the District Court and the Court of Appeals accepted as true Petitioners allegations and claims that Respondents had deprived her of property for public use without just compensation in violation of the Fifth and Fourteenth Amendments of the United States Constitution, that

Respondents had deprived her of property without substantive due process of law and that Respondents had engaged in unlawful and unconstitutional state and municipal procedures, ordinances, customs, policies and practices to deprive Petitioner of her property.

Petitioner Safranek has filed this Petition For Writ Of Certiorari with this Court to review the decision of the Tenth Circuit Court of Appeals to determine whether the holdings of Parratt v. Taylor, 451 U.S. 527 (1981) and Hudson v. Palmer, 468 U.S. 517 (1984) and their progeny apply to a claim asserting a violation of a right protected by the Bill of Rights under the United States Constitution, apply to a claim asserting a violation of the substantive component of the Due Process Clause under the United States

Constitution, and/or apply to a claim asserting a property deprivation resulting from an established state and municipal procedure, custom, policy and practice so as to preclude Petitioner from proceeding with a 42 U.S.C. §1983 action.

II

ARGUMENT

THIS COURT SHOULD GRANT CERTIORARI AND REVERSE THE TENTH CIRCUIT COURT OF APPEALS AND REMAND TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO BECAUSE ITS INTERPRETATION OF PARRATT V. TAYLOR, 451 U.S. 527 (1981) AND HUDSON V. PALMER, 468 U.S. 517 (1984) IS IN CONFLICT WITH THOSE REACHED BY A NUMBER OF OTHER FEDERAL CIRCUIT COURTS OF APPEALS AND FEDERAL DISTRICT COURTS IN CASES PRESENTING THE SAME ISSUES.

The District Court and the Court of Appeals both found that Petitioner had adequate postdeprivation state remedies, and accordingly, Petitioner's due process was satisfied and, thus, Petitioner failed to state a claim under 42 U.S.C. §1983. The District Court and Court of Appeals relied primarily on Parratt v. Taylor, 451 U.S. 527 (1981) and Hudson v. Palmer, 468 U.S. 517 (1984) and their progeny to reach their decisions.

The instant case presents a number of issues left open by this court in Parratt

v. Taylor, 451 U.S. 527 (1981), Hudson v. Palmer, 468 U.S. 517 (1984), Daniels v. Williams, 106 S.Ct. 662 (1986), Davidson v. Cannon, 106 S.Ct. 668 (1986), and Logan v. Zimmerman Brush Company, 455 U.S. 422 (1982), including whether the doctrine of Parratt and Hudson apply to claims asserting the violation of a right protected by the Bill of Rights under the United States Constitution, whether the doctrine of Parratt and Hudson apply to claims asserting a substantive due process violation, whether the doctrine of Parratt and Hudson apply to claims asserting that a property deprivation was pursuant to an established state and/or municipal procedure, policy or practice, and whether the adequacy of a state remedy is even relevant with regard to claims asserting a violation of a right protected by the

Bill of Rights, a violation of substantive due process or a property deprivation resulting from an established state and/or municipal procedure, policy or practice.

For purposes of the Motion For Summary Judgment in the District Court and Court of Appeals below, Petitioner's fundamental claims asserting a violation of a right protected by the Bill of Rights, a violation of substantive due process and a property deprivation resulting from an established state and municipal procedure, policy and practice were taken as true. Yet, the Tenth Circuit affirmed the District Court's Summary Judgment Order that Petitioner had failed to state a claim cognizable under 42 U.S.C. §1983 and dismissed the Petitioner's Complaint.

In refusing to reverse the District Court's Summary Judgment Order, the Tenth

Circuit failed to follow the clear consensus among the lower federal courts which have generally held that when a plaintiff asserts that a right guaranteed by the Bill of Rights has been violated, the rationale underlying Parratt and Hudson will not apply and the adequacy of a state remedy is irrelevant. Also, the general consensus among the lower federal courts hold that if a substantive due process claim is alleged, the rationale underlying Parratt and Hudson does not bar the availability of a 42 U.S.C. §1983 remedy. This clear consensus is as follows:

Gilmere v. City of Atlanta, 774 F. 2d 1495, 1502 (11th Cir. 1985) (en banc) *cert. denied* 106 S.Ct. 1970 (1986); Robins v. Harum, 773 F. 2d 1004, 1009 (9th Cir. 1985); Augustine v. Doe, 740 F. 2d

322, 326 (5th Cir. 1984); Mann v. City of Tucson, 782 F. 2d 790, 793 (9th Cir. 1986); Littlefield v. City of Afton, 785 F. 2d 596, 603-07 (8th Cir. 1986); Thibodeaux v. Bordelon, 740 F. 2d 329 (5th Cir. 1984); Hall v. Setton, 755 F. 2d 786 (11th Cir. 1985); State Bank of St. Charles v. Camic, 712 F. 2d 1140 (7th Cir. 1983); Wolf-Lillie v. Sonquist, 699 F. 2d 864 (7th Cir. 1983); Duncan v. Poythress, 657 F. 2d 691, 704-705 (5th Cir., Unit B 1981); Akbarr-El v. Shelley, 631 F. Supp. 1235, 1237 n.1 (N.D. Ill. 1986); Schiller v. Strangis, 540 F. Supp. 605, 614 (D. Mass. 1982); Morello v. James, 810 F. 2d 344, 348 (2nd Cir. 1987) Ramos v. Gallo, 596 F. Supp. 833, 838 (D. Mass. 1984); Holland v. Breen, 623 F. Supp. 284, 288 (D. Mass. 1985); and The Supreme Court, 1981 Term, 96 Harvard Law Review 62, 105

(1984). Accord Daniels v. Williams, 106 S.Ct. at 678 (Stevens, J., concurring).

Each of these federal cases make it clear that the rights guaranteed by the Bill of Rights and the substantive due process rights made applicable to the states through the Due Process Clause of the Fourteenth Amendment remain unaffected by the Parratt and Hudson holdings. As the Massachusetts District Court held in Holland v. Breen, supra,

> When a state actor violates substantive rights, the constitutional violation is complete at the time of the deprivation, irrespective of the postdeprivation procedures that might be available for redressing the wrong.

This analysis is consistent with Justice Stevens' separate opinion in Hudson and Daniels. In Hudson, Justice Stevens, joined by Justice Blackman,

Justice Marshall, and Justice Brennan stated:

> I join the opinion of the Court on the understanding that it simply applies the holdings of Parratt v. Taylor...to the facts of this case. I do not understand the Court's holding to apply to conduct that violates a substantive constitutional right-actions which governmental officials may not take no matter what procedural protections accompany them...

Hudson, 104 S.Ct. at 3208, note 4.

Similarly, in Daniels, Justice Stevens stated in utilizing his three-part analysis that:

> If the claim is in the first category (a violation of one of the specific constitutional guarantees of the Bill of Rights), a plaintiff may invoke §1983 regardless of the availability of a state remedy. As explained in Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L. Ed. 2d 492 (1961), this conclusion derives from the fact that the statute-the Ku Klux Act of 1871-was intended to provide a federal remedy for the violation of a federal Constitutional right. Thus, when the Fourth Amendment is violated, as in Pape, the provision of an independent federal remedy under

> §1983 is necessary to satisfy the purpose of the statute.
>
> Similarly, if the claim is in the second category (a violation of the substantive component of the Due Process Clause), a plaintiff may also invoke §1983 regardless of the availability of a state remedy. For, in that category, no less than with the provisions of the Bill of Rights, if the federal Constitution prohibits a state from taking certain actions 'regardless of the fairness of the procedure used to implement them', the constitutional violation is complete as soon as the prohibited action is taken; the independent federal remedy is then authorized by the language and legislative history of §1983.

Daniels, 106 S.Ct. at 678 (Stevens, J. concurring in the judgment).

Also, in refusing to reverse the District Court Summary Judgment Order, the Tenth Circuit failed to follow this Court's directive in Logan v. Zimmerman Brush Company, supra, and the holdings of a number of lower federal courts.

In Logan, this Court held that Parratt did not reach a situation where a

plaintiff alleges that he was deprived of property pursuant to an established state procedure. This Court held:

> Here, in contrast, it is the state system itself that destroys a complainant's property interest, by operation of law...whether the commission's action is taken through negligence, maliciousness or otherwise. Parratt was not designed to reach such a situation...Unlike the complainant in Parratt, Logan is challenging not the commission's error, but the 'established state procedure' that destroys his entitlement without according him proper procedural safeguards.

Logan, 455 U.S. at 436.

The instant case is far removed from the facts of Parratt and Hudson. In contrast, here the Respondent, Town of Limon, promulgated certain ordinances and policies, contrary to state law, to deprive Petitioner of her property rights. Specifically, Petitioner Safranek alleged in her Complaint that her property was deprived as a result of these established

state and municipal procedures, customs, policies and practices, all of which were taken as true for purposes of the Motion For Summary Judgment. The directive of this Court and other lower federal courts establish that when a deprivation is pursuant to an established state procedure then the holdings of Parratt and Hudson are inapplicable and a 42 U.S.C. §1983 claim should not be dismissed. The lower federal courts following this directive are as follows:

Berlanti v. Bodman, 780 F. 2d 296, 301 (3rd Cir. 1985); Piatt v. MacDougall, 773 F. 2d 1032, 1036 (9th Cir. 1985) (en banc); Hicks v. Feeney, 770 F. 2d 375, 378 (3rd Cir. 1985); Patterson v. Coughlin, 761 F. 2d 886, 891 (2nd Cir. 1985), *cert. denied*, 106 S.Ct. 879 (1986); Burtnieks v. City of New York, 716 F. 2d

982 (2nd Cir. 1983); McCrae v. Hankins, 720 F. 2d 863, 870 (5th Cir. 1983); LaSalle National Bank v. County of Lake, 579 F. Supp. 8, 10-11 (N.D. Ill. 1984); Wolfenbarger v. Williams, 774 F. 2d 358, 364 (10th Cir. 1985); and Lavicky v. Burnett, 758 F. 2d 468 (10th Cir. 1985).

See also, Gregory v. Town of Pittsfield, 105 S.Ct. 1380, 1382 (1985) (O'Conner, J., joined by Brennan and Marshall, J.J., dissenting from denial of petition for writ of certiorari) (Parratt should not apply when the deprivation resulted from the town's policy of not providing written notice to applicants denied general assistance, even though this policy was contrary to state law).

Lastly, a number of the federal court decisions cited above specifically hold that where a plaintiff asserts a violation

of a right protected by the Bill of Rights under the United States Constitution, or asserts a violation of the substantive component of the Due Process Clause under the United States Constitution or asserts a property deprivation resulting from an established state and/or municipal procedure, custom, policy and practice, as in the instant case, then the adequacy of any postdeprivation state remedy is irrelevant because the constitutional violation is complete at the time of the deprivation.

Also, it has long been the law in this country that an exhaustion of state court and administrative remedies is not a prerequisite to the bringing of an action under 42 U.S.C. §1983. In Monroe v. Pape, 365 U.S. 1167 (1961), this Court held that an individual deprived of Constitutional

rights by state officials (which the Respondents conceded and admitted for purposes of their Motion for Summary Judgment in the District Court) can sue those state officials directly in federal court under 42 U.S.C. §1983. Monroe, 365 U.S. at 187.

This Court expressly rejected the argument that if a defendant's conduct subjected them to state court liability, then a plaintiff would have to seek relief by bringing a court action in a state court. This Court held:

> [I]t is no answer that the state has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, but the latter need not be first sought and refused before the federal one in invoked.

Monroe, 365 U.S. at 183; Monroe, 365 U.S. at 224-46 (Frankfurter, J. dissenting).

There are a myriad of decisions on point with this United States Supreme

Court precedent including those that predate and postdate Parratt and Hudson. See:

Patsy v. Board of Regents, 457 U.S. 496 (1982); Shelton v. City of College Station, 754 F. 2d 1251 (C.A. Tex. 1985); Richards v. Meanuel County Hospital Authority, 603 F. Supp. 81 (D.C. Ga. 1984); Wells Fargo Armored Service Corporation v. Georgia Public Service Commission, 547 F. 2d 938 (C.A. Ga. 1977); Sager v. City of Woodland Park, 543 F. Supp. 282 (D.C. Colo. 1982); Patterson v. Coughlin, supra.; and LaSalle National Bank v. Lake County, supra.

Even assuming arguendo that the adequacy of a postdeprivation state remedy is relevant despite the fact that petitioner alleged a Bill of Rights violation, a substantive due process

violation and a property deprivation pursuant to an established state and municipal procedure, custom, policy and practice, the fact remains that Colorado's postdeprivation remedies to be provided to petitioner are inadequate to redress the wrong.

In Parratt, Justice Powell intimated that an absolute immunity from suit under state law would render any postdeprivation remedial scheme inadequate. Parratt, 451 U.S. at 551 n.9 (Powell, J., concurring). In the instant action, whether Petitioner attempted to pursue a claim under a theory of trespass, conversion, inverse condemnation or otherwise, she would be met by the strict governmental immunities provided by Colorado law. The Colorado Governmental Immunity Act, specifically,

Colorado Revised Statute §24-10-109(1) provides:

> Any person claiming to have suffered an injury by a public entity or by an employee thereof while in the course of such employment shall file a written notice as provided in this section within one hundred and eighty (180) days after the date of the discovery of the injury, regardless of whether the person then knew all of the elements of a claim or of a cause of action for such injury. Compliance with the provisions of this section shall be a jurisdictional prerequisite to any action brought under the provisions of this article, and failure of compliance shall forever bar any action.

Colorado Revised Statute §24-10-103(2) provides:

> "Injury" means death, injury to a person, damage to or loss of property, of whatsoever kind, which, if inflicted by a private person, would lie in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by a claimant.

Respondent Town of Limon's actions to appropriate, take, deprive, use and consume the water which should have been

available to Petitioner for her use in accordance with her vested and adjudicated water rights all happened in the late 1970's and early 1980's. It would now be an absolute travesty to hold that there are adequate postdeprivation remedies available to Petitioner and then to allow Respondents to argue that they can immunize themselves completely from damages based on the Colorado Governmental Immunity Act.

Likewise, in Colorado, if Petitioner attempted to pursue a claim under a theory of trespass, conversion, inverse condemnation or otherwise, she would be met with a statute of limitations problem. Colorado Revised Statute §13-80-102 provides in pertinent part:

> The following civil actions, regardless of the theory upon which suit is brought, or against whom suit is brought, shall be commenced

> within two years after the cause of action accrues, and not thereafter:
>
> (a) tort actions, including, but not limited to, actions for negligence, trespass,...;
>
> (g) all actions upon liability created by a federal statute where no period of limitation is provided in said federal statute;
>
> (h) all actions against any public or governmental entity or any employee of a public or governmental entity...

Again, it would be an absolute travesty to find that there are adequate postdeprivation remedies available to Petitioner, and then to allow Respondents to argue that Petitioner's claims are barred in the state court by the statute of limitations governing such actions.

In summary, the instant case gives the Court the opportunity to resolve some of the issues left open by the Court in Parratt, supra, and Hudson, supra, and their progeny and, in so doing, confirming

the consensus of the lower federal courts that when a plaintiff asserts a violation of a right protected by the Bill of Rights under the United States Constitution or asserts a violation of the substantive component of the Due Process Clause under the United States Constitution or asserts a property deprivation resulting from an established state and/or municipal procedure, custom, policy and practice, he or she will not be precluded from proceeding with a 42 U.S.C. §1983 action. Also, the instant case gives the Court the opportunity to resolve the issue of whether the adequacy of a state's postdeprivation remedies are even relevant with regard to claims asserting a violation of a right protected by the Bill of Rights, a violation of substantive Due Process or a property deprivation

resulting from an established state and/or municipal procedure, custom, policy and practice, and if so, whether the State of Colorado's postdeprivation remedies are adequate in the case at bar.

Petitioner Safranek respectfully requests this Court grant a Writ of Certiorari to the Tenth Circuit Court of Appeals, reverse that Court's decision and remand to the United States District Court for the District of Colorado.

CONCLUSION

The Petition For Writ Of Certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

OLGA SAFRANEK,

Plaintiff-Appellant,

v.

TOWN OF LIMON, DENNIS E. COONTZ, DONALD G. BURGESS, FRED PATTERSON, DELMAR L. BEATTIE, DAVID E. SCHROEDER, HOWARD STONE and NORMAN SUNDERLAND,

Defendants-Appellees.

ORDER AND JUDGMENT

Before SEYMOUR, ANDERSON and BRORBY, Circuit Judges.

Olga Safranek sued the Town of Limon, Colorado, its Mayor and the Board of Trustees, under 42 U.S.C. § 1983, for

damages and injunctive relief for unlawfully taking Safranek's water for municipal purposes.

She claimed that the taking violated her substantive and procedural due process rights under the Fifth and Fourteenth Amendments to the United States Constitution. She also alleged that the water was taken by an unlawful and unconstitutional physical intrusion, pursuant to an unconstitutional municipal policy, and that damages related both to the water and consequential damages to crops and land value. Solely for dispositional purposes in the district court and on appeal, the fundamental claims are taken as true.

Following discovery the district court granted the defendant's motion for summary judgment, and dismissed Safranek's

complaint. The court ruled that the Colorado Constitution, statutes, and common law provided "adequate remedies through which [Safranek] may not only receive just compensation, but also may seek an injunction to prohibit the defendants' actions." R. Vol. I, doc. 12 at p.4.

We agree with the district court. Although variously pleaded, Safranek's action is essentially one involving the taking of private property for a public purpose. The municipality could have taken her water rights by exercising its power of eminent domain. Failure to exercise that power gives Safranek the right to redress through an inverse condemnation proceeding. See Colo. Const. a. II, § 15; Colo. Rev. Stat. §§ 38-1-101 to 38-1-122 (1973), as amended, and 38-6-201 to 38-6-216 (1973), as amended; Atkinson v. City

of Fort Collins, 583 F.Supp. 567 (D. Colo. 1984); Mosher v. City of Boulder, Colorado, 225 F.Supp. 32, 38 (D. Colo. 1964); Kratzenstein v. Board of County Comm'rs, 674 P.2d 1009, 1010 (Colo. Ct. App. 1983; Hayden v. Board of County Comm'rs, 580 P.2d 830, 833-34 (Colo. Ct. App. 1978); Ossman v. Mountain States Telephone & Telegraph Co., 511 P.2d 517 (Colo. Ct. App. 1973); rev'd on other grounds, 520 P.2d 738 (Colo. 1974). She also had rights under Colo. Rev. Stat. §§ 37-92-501 to 37-92-504 (1973), as amended, rights under the Colorado Rules of Civil Procedure, and possible common law rights.

Safranek acknowledges that she pursued none of those remedies. She represents that Robert Safranek contacted the State District or State Division of Water Engineer and received an unsatisfactory

response. That is not enough. Under the circumstances, Safranek's constitutional claims are not ripe and may not be pursued in Federal Court. See Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194 (1985); First English Evangelical Lutheran Church v. County of Los Angeles, _____ U.S. _____, 107 S. Ct. 2378, 2385, n.6, 2389, n.10 (1987).

We have considered and reject as meritless the other issues raised by Safranek in her appeal. The judgment of the district court is AFFIRMED.

ENTERED FOR THE COURT

Stephen H. Anderson
Circuit Judge

FILED
United States Court of Appeals
Tenth Circuit

Dec. 07, 1988

ROBERT L. HOECKER
Clerk

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
JUDGE JIM R. CARRIGAN

CIVIL ACTION NO. 82-C-494

OLGA SAFRANEK,

Plaintiff [s],

v.

TOWN OF LIMON, et al.,

Defendant [s].

MINUTE ORDER - Judge Jim R. Carrigan

The "motion to reconsider, alter or amend judgment" is denied.

A copy of this Minute Order was sent to:

A. Gary Bell, Esq.
26 W. Dry Creek Circle, #575
Littleton, CO 80120

Robert D. Hawthorne, Esq.
180 E. Ave.
P.O. Box 218
Limon, CO 80828

Dated: August 29, 1986

Jane C. Trexler,
Secretary

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 82-C-494

OLGA SAFRANEK,

Plaintiff,

v.

TOWN OF LIMON, DENNIS E. COONTS, DONALD G. BURGESS, FRED PATTERSON, DELMAR L. BEATTIE, DAVID E. SCHROEDER, HOWARD STONE and NORMAN SUNDERLAND,

Defendants.

SUMMARY JUDGMENT

Pursuant to and in accordance with the Order entered by the Honorable Jim R. Carrigan on August 18, 1986, it is

ORDERED that judgment is entered for the defendants and against the plaintiff, Olga Safranek, upon the issue of liability pursuant to Rule 56 of the Federal Rules of Civil Procedure.

Dated at Denver, Colorado this 18th day of August, 1986.

BY THE COURT:

JAMES R. MANSPEAKER, CLERK

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 82-C-494

OLGA SAFRANEK,

Plaintiff,

v.

TOWN OF LIMON, et al.m

Defendants.

ORDER

CARRIGAN, J.

Plaintiff brings this action under 42 U.S.C. § 1983 alleging that her civil rights have been violated. Plaintiff, in 1932 and in 1955, was adjudicated the owner of certain water rights located in Lincoln County, Colorado. Sometime in 1980 or 1981, the Town of Limon, Colorado ("Town of Limon"), instituted state court

proceedings to adjudicate certain water rights regarding wells it owned. These actions were allegedly decided in favor of the plaintiff and adversely to the Town of Limon.

In this action, the plaintiff contends that the Town of Limon is pumping water from the same aquifer or same source of water as the plaintiff, to the plaintiff's detriment and damage. Plaintiff asserts claims for unlawful and unconstitutional municipal policy (First Claim) and unlawful taking of property without procedural or substantive due process (Second and Third Claims).

Besides the Town of Limon, the named defendants include the Town's Mayor and members of the Town's Board of Trustees, all sued in their official capacities. Defendants have moved for summary judgment.

Plaintiff has responded by opposing the motion.

The parties have thoroughly briefed all issues and oral argument would not materially assist my decision. Jurisdiction is based on 28 U.S.C. § 1331.

Defendants contend that this action should be dismissed because the plaintiff has adequate postdeprivation state remedies. Defendants rely primarily on Parratt v. Taylor, 451 U.S. 527 (1981) and Hudson v. Palmer, 104 S. Ct. 3194 (1984).

In Parratt v. Taylor, supra, the United States Supreme Court held that a claim of negligent deprivation of property by a state official is insufficient to support a § 1983 action. The Court concluded in Parratt that the state's tort remedy provided the aggrieved party with all the process that was due.

A similar result was reached in Hudson v. Palmer, 468 U.S. 517 (1984). There, the Court stated that "an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for the loss is available." Id. at 533.

Parratt's holding was reaffirmed in part in Daniels v. Williams, 54 U.S.L.W. 4090 (U.S.S. Ct. Jan. 21, 1986). The Daniels decision departed somewhat from Parratt by holding that the mere lack of due care by a state official does not deprive a person of rights protected by the Fourteenth Amendment. Parratt's holding that due process is satisfied if the state's

postdeprivation remedies are adequate, however, was reaffirmed in Daniels.

The Parratt rationale has been applied in situations similar to the case at bar. In Collier v. City of Springdale, 733 F.2d 1311 (8th Cir. 1984), a trout farm owner sued the City of Springdale, Arkansas, when sewage accidentally discharged from the City's lift station and polluted the plaintiff's trout farm beds. Collier predicated his action on §1983 and claimed that his property had been taken without due process. The Eighth Circuit Court of Appeals concluded that Arkansas provided adequate statutory mechanisms for compensating property owners in Collier's situation, and, relying on Parratt v. Taylor, supra, dismissed his action for failure to state a claim cognizable under § 1983.

Similarly, in Atkinson v. City of Fort Collins, 583 F. Supp. 567 (D.Colo. 1984) the plaintiffs claimed that the City's action in constructing and operating an electrical streetcar along a city street interfered with private property rights. Judge Moore concluded that the plaintiff's § 1983 claims should be dismissed because Colorado provided adequate remedies through which compensation for the alleged taking may be sought:

> To the extent the complaint seeks to force municipal officials to follow applicable municipal laws, the state of Colorado provides a remedy in the nature of mandamus. Colo. R. Civ. P. 106. Further, the state provides a remedy to those who believe they have suffered a loss of property at the hands of the state. Article II. Section 15, of the Colorado Constitution makes compensable both a taking of and damage to property inflicted by the state of Colorado or one of its constituent parts. See Mosher v. City of Boulder, Colorado, 225 F. Supp. 32 (D. Colo. 1964). The section has been read to encompass an action for inverse condemnation, where a taking is alleged and the state has

> not proceeded by way of an eminent domain proceeding. Ossman v. Mountain States Tel. and Tel. Co., 184 Colo. 360, 520 P.2d 738 (1974). The inverse condemnation is tried as if it were an eminent domain proceeding pursuant to the procedure established in Colo. Rev. Stat. §§ 38-1-101 to 38-7-107. The state also allows the property owner to bring his action for inverse condemnation in the alternative as an action for trespass. Ossman, supra. Id. at 569.

In reaching his conclusion, Judge Moore also relied on Parratt v. Taylor, supra.

Plaintiff's action in the instant case asserts claims for interference by a municipality with her water rights. As noted in Atkinson v. City of Fort Collins, supra, the State of Colorado affords the plaintiff adequate remedies through which she may not only receive just compensation but also may seek an injunction to prohibit the defendants' actions. Although the Plaintiff argues that these remedies are

inadequate, that contention is not factually supported.

Finally, I must reject the plaintiff's argument that this case is controlled by Logan v. Zimmerman Brush Co., 445 U.S. 422 (1982). That case involved an employment discharge situation in which established state postdeprivation remedies were held to be inadequate. Recently, the United States Supreme Court ruled that an employee who has a constitutionally protected property interest in his or her employment is entitled to some kind of hearing prior to being discharged. Cleveland Board of Education v. Loudermill, 84 L. Ed. 2d 494 (1985).

Plaintiff also relies on Gregory v. Town of Pittsfield, 105 S. Ct. 1380 (1985) (mem. dec.). There the Supreme Court declined to grant certiorari to review the denial

of assistance benefits where no administrative hearing had been afforded to the applicant. The published opinion is the dissenting opinion of three members of the Supreme Court who voted in favor of review. Thus, the plaintiff's reliance on this decision is somewhat misplaced.

I conclude that the plaintiff has failed to state a claim cognizable under §1983. Because the facts are not in dispute, the defendant's motion for summary judgment is granted.

Accordingly, it is ordered that the defendants' motion for summary judgment is granted, and the plaintiff's complaint and action are dismissed. Each party shall bear her, his or its own costs.

Dated at Denver, Colorado, August 18, 1986.

BY THE COURT:

JIM R. CARRIGAN, JUDGE
UNITED STATES DISTRICT COURT